No. 19–1

IN THE

Supreme Court of the United States

MARY GULDOON,

Petitioner,

v.

STATE OF LACKAWANNA BOARD OF PAROLE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRTEENTH CIRCUIT

BRIEF OF RESPONDENT

Team 18

QUESTION PRESENTED

1. Whether Petitioner's parole conditions established by the Lackawanna Registration of Sex Offenders Act burden Petitioner's rights under the First and Fourteenth Amendment.

2. Whether the conditions of parole established by Lackawanna's Registration of Sex Offenders Act and imposed on Petitioner violated the Ex Post Fact Clause.

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STATEMENT OF THE CASE

Statutory History

In 2016, the State of Lackawanna amended the Registration of Sex Offenders Act, Executive Law § 25-c ("ROSA"), to provide more protections for the public from the dangers of sexual offenders from "the danger of recidivism posed by sex offenders . . ." Lackawanna Correctional Law § 168. The amendment to ROSA created new parole conditions including travel restrictions from entering "school grounds" and access to Internet to use "commercial social networking websites." Lackawanna's Penal Law § 220.00(14)–(15). ROSA imposed the special conditions added by the amendment to sex offenders who were paroled after its enactment. *Guldoon v. Lackawanna Bd. of Parole*, 999 F. Supp. 3d 1, 2 (M.D. Lack. 2019).

Facts

Mary Guldoon ("Petitioner") is a Level II sex offender. *Id.* at 1. Before her conviction, Petitioner was an introductory computer science teacher at Old Cheektowaga High School. *Id.* In 2010, Petitioner initiated a sexual relationship with a fifteen-year-old student enrolled in her computer science class at Old Cheektowaga High School. *Id.* Petitioner abused the child in her classroom and in her home. *Id.* Petitioner used her personal car to transport the minor from Old Cheektowaga High School to her private home. *Id.* During the abuse, Petitioner used e-mail to communicate with the minor she abused. *Id.* Petitioner continued her abuse of the minor until she was discovered by Ed Rooney, the Old Cheektowaga High School principal. Guldoon Aff. ¶ 14.

In 2011, Guldoon plead guilty to one count each of: (a) rape in the third degree; (b) criminal sexual act in the third degree; and (c) sexual misconduct. Compl. ¶ 6. Petitioner received an intermediary sentence of ten to twenty years *Guldoon*, 999 F. Supp. 3d at 1–2. Petitioner was released in 2017 and given a five-year parole term with special conditions in accordance with her sex offender status under ROSA. *Id.* at 2. Pursuant to ROSA, Petitioner's parole conditions included a surrender of her driver's license, a prohibition of traveling within 1,000 feet from a school, and a ban from accessing any "commercial social networking website." Compl. ¶ 21–23.

Procedural History

Petitioner filed an action in the District Court of the Middle District Court of Lackawanna alleging that ROSA violated her rights under the First and Fourth Amendment. The district court granted Respondent's motion for summary judgment. On appeal, the Thirteenth Circuit affirmed. This Court granted writ of certiorari.

SUMMARY OF THE ARGUMENT

I. Parole conditions established under ROSA that restrict Petitioner's ability to travel within 1,000 feet from a school or similar facility and require her to surrender her driver's license does not violate the Fourteenth Amendment because this Court has never established a substantive due process right to intrastate travel. Because there is no substantive right to intrastate travel, Petitioner's parole condition only need to be rationally related to a legitimate

government interest. This Court has held that States have a legitimate interest in public safety and protecting minors from sexual abuse. Furthermore, if a right to intrastate travel were recognized, Petitioner's parole conditions would not violate the Fourteenth Amendment because the conditions do not establish an actual barrier to intrastate travel.

Petitioner's parole conditions that restrict her access to specific commercial social networking websites does not violate the First Amendment. Because ROSA does not limit the content or the subject of Petitioner's speech, it is a content neutral statute, and therefore, subjected to intermediate scrutiny review. ROSA satisfies this Court's intermediate scrutiny test. Read and interpreted under the natural-meaning doctrine, ROSA only limits a paroled sex offender access to true social networking websites that exist for the purpose of establishing personal relationships between users. Furthermore, ROSA is distinguishable from *Packingham* because ROSA only imposes Internet restrictions on paroled sex offenders.

II. The Ex Post Facto Clause bars legislatures from passing laws that retroactively increase the punishment for a crime after its commission. ROSA is not retroactive because it affected the parole conditions that Petitioners did not yet have when the law took effect. Parole conditions are set at a parole hearing and do not impact the length of incarceration. Moreover, parole conditions also are not considered punishment under the Ex Post Facto Clause. The Ex Post Facto Clause affects the ability of a legislature to change the legal consequences for a crime, which this Court has never held to include the conditions of parole. This Court held that a retroactive change to a parole statute can only violate the Ex Post Facto Clause if it impacts the length of incarceration. ROSA did not affect the length of Petitioner's incarceration. And, under a Mendoza-Martinez factor analysis, ROSA's effect are not punitive because ROSA (1) does not impose affirmative restraints in light of the alternative, incarceration; (2) parole conditions historically have not been considered punishment; (3) does not parole retribution or deterrence; and (4) has a clearly stated rational purpose to protect the public from the dangers of sex offenders that is not excessive in the light of the purpose. This Court and lower courts has upheld similar parole conditions in order to accomplish this goal.

ARGUMENT

I. THE PAROLE CONDITIONS SET UNDER ROSA ARE CONSTITUTIONALLY VALID UNDER THE FIRST AND FOURTEENTH AMENDMENTS.

"Parole is not freedom." *United States v. Polito*, 583 F.2d 48, 54 (2d Cir. 1978). It is an established variation of imprisonment for convicted criminals. *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972) (holding that a parolee does not have the "absolute liberty to which every citizen is entitled"). Parole is a continuation of a sentence outside of prison walls. *Polito*, 583 F.2d at 54. (noting that the difference between parolees and ordinary citizens "is based on the fact that parolees have been convicted of a crime and are still serving their sentence while on parole, albeit not within prison walls"). Because parolees are still serving their sentence, parolees maintain a different status and are afforded different standards of protections than ordinary

citizens. *Id.* Parolees possess fewer constitutional rights than ordinary citizens. *Id.* Parolees, therefore, only have a conditional liberty interest in their parole conditions. *Morrissey*, 408 U.S. at 480.

Moreover, parolees do not have a "constitutionally protected interest to be free from special parole conditions. *Guldoon v. Lackawanna Bd. of Parole*, 999 F. Supp. 3d 1, 6 (M.D. Lack. 2019); *Boddie v. Chung*, No. 09 CV 04789 (RJD) (LB), 2011 WL 1697965, at *5 (E.D.N.Y. May 2, 2011); *Pena v. Travis*, No. 01 Civ. 8534 (SAS), 2002 WL 31886175, at *13 (S.D.N.Y. Dec. 27, 2002) (stating that special conditions of parolee are up to the discretion of the Board of Parole and a parolee "does not have a protected liberty interest in being free from special parole conditions"); *see also* Registration of Sex Offenders Act, P.L. 2016-1 § 1(B) (authorizing the court and parole board the authority to impose conditions of probations that are reasonable restrictions that are necessary and appropriate). And, due to the nature of the offense and public safety concerns, persons convicted of sexual crimes are subject to additional parole conditions that likely would not be imposed on other parolees. Lackawanna Correctional Law § 168; *see also Conn. Dep't. of Pub. Safety* v. *Doe*, 538 U.S. 1 (2003) ("Sex offenders are a serious threat in the United States").

A. The Parole Conditions Set Under ROSA Do Not Violate the Petitioner's Fourteenth Amendment Right to Travel.

Petitioner alleges that her parole conditions under ROSA violate her right to intrastate travel. *Guldoon*, 999 F. Supp. 3d at 3. However, this Court has never recognized a fundamental right to intrastate travel under the Fourteenth Amendment Due Process Clause. *See Mem'l Hospital v. Maricopa County*, 415 U.S. 250, 255–56 (1974) (reserving the question of whether there is a fundamental right to intrastate traveling); *see also State v. Graf*, 412 N.W.2d 902 (Wis. App. Ct. 1987) (noting that "the United States Constitution does not guarantee a right upon public highways").

The Seventh, Eighth, and D.C. Appellate Circuit have upheld parole conditions that restrict the ability to travel or reside within a state specifically because this Court has never established a fundamental right to intrastate travel. *Doe v. Miller*, 405 F.3d 700, 712–14 (8th Cir. 2005) (holding that the parolee does not have a right to intrastate travel and stating that even if this Court had recognized a right to intrastate travel, the Iowa residency restriction for registered sex offenders, which ultimately effect travel capabilities, would not interfere with the right to travel); *Doe v. City of Lafayette*, 377 F.3d 757, 771 (7th Cir. 2004) (holding that prohibiting sex offenders from parks did not implicate a sex offender's right to travel because offenders were "not limited in moving from place to place within his locality to socialize with friends and family, to participate in gainful employment or to go to the market to buy food or clothing[]"); *Hutchins v. District of Columbia*, 338 U.S. App. D.C. 11 (D.C. Cir. 1999) (holding that juveniles do not have a fundamental right to be in a public place without adult supervision). And, simply because there is the possibility for a less restrictive parole condition, does not entitle a parolee to

due process protections. *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 7 (1979).

Moreover, for the Petitioner to assert a fundamental right to intrastate travel under the Fourteenth Amendment Due Process Clause, the Petitioner must demonstrate that the right to intrastate travel is "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) or "deeply rooted in this Nation's history and tradition." *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977). Though this Court has recognized the right to interstate travel under similar reasoning, *see Shapiro v. Thompson*, 394 U.S. 618, 629–30 (1969), this Court refrained from recognizing a right to intrastate traveling. And, it would be improper to find that intrastate travel is a correlated right established from the right to interstate travel.[1] Moreover, this Court's modern recognition of substantive due process rights mostly involves family or procreative decisions. *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986). A right to intrastate travel is not analogous to this Court's recent establishment substantive due process rights. *Id.*

Furthermore, this Court has expressed concern in broadening substantive due process laws and enacting "judge-made constitutional law [that has] little or no cognizable roots in the language or design of the Constitution." *Id.* Petitioner has not provided any basis for why and how this Court should proceed to recognize a right to intrastate travel. This Court, therefore, should not abandon its cautionary approach when addressing Petitioner's suggestion that a substantive due process to intrastate travel exists.

Because ROSA does not implicate a fundamental right, ROSA only need to be reasonably related to a government interest. *Malone v. United States*, 502 F.2d 554, 556–57 (9th Cir. 1974), *cert. denied*, 419 U.S. 1124 (1975); *Birzon v. King*, 469 F.2d 1241, 1243 (2d Cir. 1972); *Hyser v. Reed*, 115 U.S. App. D.C. 254 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 957 (1963); *see also LoFranco v. U.S. Parole Comm'n*, 986 F. Supp. 796, 804 (S.D.N.Y. 1996), *aff'd* 175 F.3d 1008 (2d Cir. 1999) (nothing that "[a]s long as there is a reasonable nexus between a special condition of release and the crime for which the individual was convicted, a parolee may have his actions reasonably restriction in order to prevent his future criminality"); *Amunrud v. Dep't of Soc. & Health Servs.*, 124 Wash. App. 884, 889–90 (Wash. Ct. App. 2004) (holding that the state need only a legitimate state interest that is rationally related to the revocation of a driver's license for failure to pay child support). In *Ashcroft v. Free Speech Coalition*, this Court recognized that a State has an interest in protecting minors from sexual abuse. 535 U.S. 234, 244–45 (2002). Therefore, States have the right and capabilities to pass laws for the purpose of protecting minors from future sexual abuse. *Id.* at 245. Petitioner, however, has failed to demonstrate that the special conditions of her parole are not reasonably related to Respondent's "interest in protecting minors, reducing recidivism, and preventing harm to the public." *Guldoon*, 999 F. Supp. 3d at 7. And, Petitioner has failed to alleged that the special parole conditions

[1] There are two components to the right to interstate travel that is not necessarily correlative to a right to intrastate travel. The right to interstate travel is born out of the Due Process Clause of the Fourteenth Amendment and the Privileges and Immunities Clause, U.S. Const. art. IV § 2. *Doe v. Miller*, 405 F.3d 700, 711 (8th Cir. 2005). A right to intrastate traveling, in contrast, would not would not have a similar constitutional basis.

imposed were arbitrary and capricious. *Id*. Therefore, ROSA satisfies this Court's rational basis standard.

1. ROSA would not impede on Petitioner's ability to travel if this Court recognized a right to intrastate travel.

Even if the Court established a right to intrastate travel, the Petitioner's parole conditions would not violate the Fourteenth Amendment. In *Doe v. Miller*, the Eighth Circuit held that even if the right to intrastate travel was recognized, the right would not be violated by parole conditions that restrict the right to travel within 2,000 feet of a school or similar facility because "it does not erect any actual barrier to intrastate movement." 405 at 713. Similarly, Petitioner's parole conditions restricting her from traveling within 1,000 feet of a school or similar facility and requiring her to surrender of her driver's licenses does not bar her from moving within Lackawanna. Petitioner's parole conditions simply restrict her from driving a car and taking specific routes. The coincidence that Petitioner resides near two schools does not entitle her to a right of intrastate travel. And, the mere fact that Petitioner's "restrictions are difficult and cumbersome is not enough to make them unconstitutional." *People v. Parilla*, 109 A.D.3d. 20, 29 (N.Y. App. Div. 2013); *see also Franceschi v. Yee*, 887 F.3d 927 (9th Cir. 2017) (holding that the revocation of the petitioner's driver's license does complicate his ability to perform his chosen profession, "[b]ut this complication is not a substantive due process violation. . .").

Furthermore, lower courts routinely uphold parole conditions that restrict, or have the effect of restricting, the ability to travel "as long as [the conditions] are reasonably related to a parolee's past conduct, are not arbitrary and capricious, and are designed to deter recidivism and prevent further offenses." *Robinson v. N.Y. State*, No. 1:09-cv-0455 (GLS\RFT), 2010 U.S. Dist. LEXIS 144553, at *14, *20–21 (N.D.N.Y. Mar. 26, 2010) (holding that mandate requiring a parolee to surrender their driver's license does not violate the Eighth Amendment because the plaintiff failed to allege a deprivation of life necessities); *see also, e.g.*, *Guldoon*, 999 F. Supp. 3d at 7; *Pena*, 2002 WL 31886175, at *34 n.5 (holding that a parolee's right to interstate travel can be abridge by parole restrictions without implicating a constitutional violation); *Bagley v. Harvey*, 718 F.2d 921, 924 (9th Cir. 1983) (holding that a parolee does not have a constitutionally protected interest in interstate travel and that "an individual's right to travel, extinguished by conviction and subsequent imprisonment, is not revived upon parole"); *Alonzo v. Rozanski*, 635 F. Supp. 496, 498 (N.D. Ill. 1986) (noting that a parolee does not have a right to interstate travel); *Rizzo v. Terenzi*, 619 F. Supp. 1186, 1189–91 (E.D.N.Y. 1985) (upholding the plaintiff's travel restrictions because parolees do not have a right to unrestricted travel). "The viability of the parole system depends upon certain restrictions, among them the ability to monitor and control travel." *Id.* at 1189. Here, as previously stated, Respondent has a recognizable interest in limiting a sex offender's ability to travel near school or similar facilities that service minors. *Ashcroft*, 535 U.S. at 244–45. This interest is specifically great here because Petitioner used her position as a teacher at Old Cheektowaga County High School to sexually

abuse a child. Petitioner also used her personal car to transport the minor she abused from school ground to her private home to engage in sexual conduct.

B. The Parole Conditions Imposed Under ROSA Does Not Violate Petitioner's First Amendment Right to Free Speech

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. In *Gitlow v. New York,* this Court held that the freedom of speech is "among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." 268 U.S. 652, 666 (1925). In limited circumstances a State may burden this right. *Ashcroft*, 535 U.S. at 244 (listing cases when Congress has limited the right to free speech). As previously mentioned this Court recognized that "sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people." *Id.*; *New York v. Ferber*, 458 U.S. 747, 757 (1982) ("The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance"). States, therefore, have an interest in protecting children from sexual abuse. *Ashcroft*, 535 U.S. at 245. A state's interest "by itself [however,] does not justify laws suppressing protected speech." *Id.*

Petitioner alleges that ROSA infringes on her right to freedom of speech because it restricts her access to certain commercial social networking websites. *Guldoon*, 999 F. Supp. 3d at 3. Petitioner does not allege that her parole conditions infringe on the content or subject of her speech. *Id.* In *Turner Broadcasting System v. FCC*, this Court held that statutes and "regulations that are unrelated to the content of speech are subject to intermediate level of scrutiny, because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue." 512 U.S. 622, 642 (1994) (internal citation omitted). And, this Court provides governments greater "leeway to regulate features of speech unrelated to its content." *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014). Therefore, the "principal inquiry in determining content-neutrality . . . is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

Statutes and regulations that restrict a parolee's Internet access in order to protect children are content neutral "because it restricts speech without reference to the expression's content." *Doe v. Prosecutor*, 705 F.3d 694, 698 (7th Cir. 2013); *see also Doe v. Harris*, 772 F.3d 563, 576 (9th Cir. 2014) (holding that California's CASE Act which requires a publication of a sex offender's Internet use and usernames is content-neutral and therefore, subject to intermediate scrutiny); *Doe v. Neb.*, 898 F. Supp. 2d 1086, 1093 (D. Neb. 2012) (holding that Nebraska statute requiring sex offenders to disclose "remote communication device identifiers, addresses, domain names, and Internet and blog sites used" was subject to intermediate scrutiny); *White v. Baker*, 696 F. Supp. 2d 1289, 1307–08 (N.D. Ga. 2010) (holding that the Georgia statue requiring sex offenders to produce their email addresses, usernames, and passwords was subject to intermediate scrutiny). Furthermore, the purpose of these statutes is to increase public safety.

Ward, 491 U.S. at 791 (noting that "[t]he government's purpose is the controlling consideration[] when determining if a statute is content neutral). ROSA does not target the content of Petitioner's speech. Rather, it restricts forums where speech may be expressed. And, ROSA was enacted and amended to further public safety concerns. It, therefore, is reviewed under intermediate scrutiny, not strict scrutiny.

1. ROSA is narrowly tailored and does not substantially affect Petitioner's First Amendment right to free speech.

For content-neutral statutes to survive First Amendment intermediate scrutiny, the statute must be "narrowly tailored to serve a significant governmental interest, and . . . leave ample alternative channels for communication of the information." *Id.* "[W]hen a convict is conditionally released on parole, the Government retains a substantial interest in ensuring that its rehabilitative goal is not frustrated and that the public is protected from further criminal acts by the parolee." *Birzon*, 469 F.2d at 1243. To ensure the successful rehabilitation of a sex offender, States impose parole conditions to limit a sex offender's ability to converse and associate with minors to decrease the opportunities offenders have to recidivate. *See* Registration of Sex Offenders Act, P.L. 2016-1 §1(B). Social media websites provide a "relatively unlimited, low-cost capacity for communication of all kinds." *Reno v. ACLU*, 521 U.S. 844, 870 (1997). Unfortunately, social media providers have not created effective safeguards that completely protect minors from sexual predators, obscene content, or harassment. *See* Registration of Sex Offenders Act, P.L. 2016-1 §1(B). As Justice Alito noted in his concurrence in *Packingham v. North Carolina*, "[t]he internet provides previously unavailable ways of communicating with, stalking, and ultimately abusing children." 137 S. Ct. 1730, 1739–40 (2018) (Alito, J., concurring). As such, many states, including Lackawanna, passed laws to restrict sex offenders' ability to use the Internet or Internet capable devices as a condition of parole. Registration of Sex Offenders Act, P.L. 2016-1(A)–(B).

In *Packingham v. North Carolina*, this Court stated "that the First Amendment permits a State to enact specific, narrowly tailored laws that prohibit a sex offender from engaging in conduct that often presages a sexual crime, like contacting a minor or using a website to gather information about a minor." 137 S. Ct. at 1737; *see also Doe*, 705 F.3d at 698 (declaring that a total social media ban can be narrowly tailored, "if each activity within the proscription's scope is an appropriate targeted evil"). Moreover, ROSA also "need not be the least restrictive or least intrusive means of" addressing Respondent's legitimate interests. *Ward*, 491 U.S. at 798. "So long as the means chosen are not substantially broader than necessary to achieve the government's interest, . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Id.* at 800.

Examining the language of the statute, the preamble of ROSA acknowledges the barriers to employment and education that parolees face. Registration of Sex Offenders Act, P.L. 2016-1 §1(A). ROSA states that "any measure that restricts an offender's use of the internet must be

tailored to specifically target the types of offenses committed on the internet while not making it impossible for such offenders to successfully reintegrate back into society." *Id.* Therefore, a parolee's offense does not completely conclude the conditions set on parole. ROSA allows the Parole Board to utilize a parolee's individual circumstances when constructing parole conditions.

Furthermore, ROSA has a specific and narrow definition of what websites parolees can access. ROSA only prohibits access to "commercial social networking websites." Lackawanna Executive Law § 259-c (15). Under ROSA, a commercial social networking website is defined as one that operates "for the purpose of establishing personal relationships with other users[.]" *Id.* To be considered a commercial social network website under ROSA, the website also must permit minors the ability to:

> (i) create web pages or profiles that provide information about themselves where such web pages or profiles are available to the public or to other users; (ii) engage in direct or real time communication with other users, such as a chat room or instant messenger; and (iii) communicate with persons over eighteen years of age; provided, however, that for purposes of this subdivision, a commercial social networking website shall not include a website that permits users to engage in such other activities as are not enumerated herein.

Id. Commonly used websites such as Amazon.com, Webmd.com, Washingtonpost.com do not fall under ROSA's definition of commercial social networking website. *See Packingham*, 137 S. Ct. at 1741–43 (2018) (Alito, J., concurring). ROSA only restricts websites that are commonly known as social networking websites, like Facebook.com and Twitter.com. Furthermore, under the natural-meaning of "commercial social networking websites, ROSA does not restrict websites such as Amazon.com, Webmd.com, Washingtonpost.com, or Google.com because the purpose of these websites is not to establish personal relationship with other users and do not permit users to engage in communications in a chat room.

Furthermore, this Court stated that "[i]t has long been a tenet of First Amendment law that in determining a facial challenge to a statute, if it be 'readily susceptible' to a narrowing construction that would make it constitutional, it will be upheld." *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 397 (1988) (citing *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *Broadrick v. Okla.*, 413 U.S. 601 (1973)). Thus, ROSA is narrowly tailored to serve the Respondent's legitimate interest in prohibiting convicted sex offenders from associating with minors without imposing a significant burden on Petitioner's First Amendment right to freedom of speech. ROSA does not implicitly impose an overbroad ban to the Internet.[2] Notwithstanding

[2] "[T]he overbreadth doctrine is "strong medicine" to be employed "sparingly and only as a last resort." *United Food & Commercial Workers In't Untion v. IBP, Inc.*, 857 F.2d 422, 432 (8th Cir. 1988) (quoting, *Broadrick v. Okla*., 413 U.S. 601, 613, (1973)). "A statute is not overbroad unless the overbreadth is not only real, but substantial as well, judged in relation to the statute's plainly legitimate [intent]." *Id.* at 615 (citing *Boos v. Barry*, 485 U.S. 312, 108 S. Ct. 1157, 1168, 99 L. Ed. 2d 333 (1988); *City of Houston v. Hill*, 482 U.S. 451, 107 S. Ct. 2502, 2508, 96 L. Ed. 2d 398 (1987).

the websites that fall under the definition of "commercial social networking website," ROSA allows Petitioner to use the Internet.

2. This Case is distinguishable from *Packingham v. North Carolina* because ROSA imposes parole conditions.

In *Packingham v. North Carolina*, this Court held that the North Carolina statute prohibiting all registered sex offenders from accessing "a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages," 137 S. Ct. 1730, 1734, violated the First Amendment because the statute was overly broad and substantially burdened the right to free speech. *Id*. at 1737. However, in deciding *Packingham*, this Court relied on the "troubling fact that the law impose[d] severe restrictions on persons who already have served their sentence and are no longer subject to the supervision of the criminal justice system." *Id.* ROSA, however, only imposes Internet restrictions as a parole condition during supervised release. Registration of Sex Offenders Act, P.L. 2016-1 §1(A)–(B).

The statute under review in *Packingham* imposed "post-supervised released conditions." *Packingham*, 137 S. Ct. 1730, 1734. In other words, conditions that persist after the term probations or parole had concluded. *United States v. Halverson*, 897 F.3d 645, 658 (5th Cir. 2018). "[T]he statute at issue in *Packingham* was prospective: rather than simply punishing a past crime, the statute there made it a new felony for a person to use all social-media outlets, even though that person had had all impingements upon his constitutional rights lifted by fully serving the prior sentence." *United States* v. *Antczak*, No. 17-11439, 2018 U.S. App. LEXIS 28401, at *23 (11th Cir. Oct. 9, 2018). ROSA, on the other hand, does not impose Internet restrictions on all registered sex offenders in the state of Lackawanna. ROSA is applicable only to parolees that meet the statutory definition of sex offender set forth in ROSA. Lackawanna Executive Law § 259-c (15) and Lackawanna Correctional Law § 168-a(1). Further, nothing in the language of the statute suggests that ROSA would impose an internet restriction past a parolee's term of supervised release.

Furthermore, several district circuits distinguished parole conditions restricting access to the Internet from *Packingham*. *United States v. Browder*, 866 F.3d 504, 512 n.26 (2d Cir. 2017) (noting that the Internet ban in question in *Packingham* "extended beyond the completion of a sentence."); *Halverson*, 897 F.3d at 658 (distinguishing its case from *Packingham* and held that *Packingham* does not apply to a supervised-release context); *United States v. Rock*, 863 F.3d 827, 831 (D.C. Cir. 2017) (holding that Packingham does not apply to a supervised-release condition, because it "is not a post-custodial restriction of the sort imposed on Packingham"); *United States v. Whitten*, No. 7:14CR00049, 2018 U.S. Dist. LEXIS 69211, at *13 n.2 (W.D. Va. Apr. 23, 2018) (holding that it this case was distinguishable from Packingham, because defendant's conditions were individualized and in effect for only the duration of his supervised release). In *United States v. Pedalhore*, the Southern District Court of Mississippi explained that *Packingham* is inapplicable to a parolee's circumstances because "while on supervised release

[the parolee] is serving his criminal sentence[.]" No. 1:17CV215-LG, 2017 WL 4707458, at *2 (S.D. Miss. Oct. 19, 2017); *see also Morrissey*, 408 U.S. at 477 (defining parole as a variation of incarceration). The Eleventh Circuit similarly distinguished *Packingham* in *United States v. Antczack* when it upheld a lifetime computer use ban imposed on the parolee because the condition was a result of past behavior and a part of the overall sentence. *Antczack*, 2017 U.S. App. LEXIS 28401, at *22–23; *see also United States v. Carpenter*, 803 F.3d 1224, 1237–40 (11th Cir. 2015) (upholding a condition of supervised release that prohibited him from possessing a computer for life.).

In *Packingham*, this Court stated that its decision "should not be interpreted as barring a State from enacting more specific laws than the one at issue." 137 S. Ct. 1730, 1737 (2017). Because ROSA only applies to paroled sex offenders it does not suffer from a similar "troubling fact" that persuaded this Court to strike down the North Carolina statute in *Packingham.* And, as previously discussed, ROSA is narrowly tailored statute to survive intermediate scrutiny. ROSA, therefore, does not violate Petitioner's First Amendment right to freedom of speech.

II. ROSA DOES NOT VIOLATE THE EX POST FACTO CLAUSE

Article I of the Constitution prohibits Congress and States from passing an ex post facto law. U.S. Const. art. I § 9–10. Ex post facto is a Latin "term of art" translated as "after the fact." *Collins v. Youngblood*, 497 U.S. 37, 41 (1990); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) (noting the need to explain ex post facto because "without explanation, it is unintelligible, and means nothing[]"). This Court has never tried to "precisely delimit the scope of this Latin phrase[] but ha[s] instead given it substance by an accretion of case law." *Dobbert v. Florida*, 432 U.S. 282, 292 (1977). In *Calder v. Bull*, Justice Chase began that process by providing four categories of laws considered to be ex post facto:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.

Calder, 3 U.S. at 390. In *Calder*, this Court provided a blueprint for what the Ex Post Facto Clause applied to in order to strike down statutes that "create, or aggravate, the crime; or encrease the punishment, or change the rules of evidence, for the purpose of conviction." *Id.* at 391. Since this Court's decision in *Calder*, these categories have consistently been used to determine whether a penal law is applied retroactively. See, e.g., Lynce v. Mathis, 519 U.S. 433, 441 n.13 (1997); *Dobbert*, 432 U.S. at 293; *Malloy v. South Carolina*, 237 U.S. 180, 183–84, (1915); *Mallett v. North Carolina*, 181 U.S. 589, 593–94, (1901); *Thompson v. Missouri*, 171 U.S. 380, 382, 387 (1898); *Hawker v. New York*, 170 U.S. 189, 201 (1898) (Harlan, J., dissenting); *Gibson v. Mississippi*, 162 U.S. 565, 589–90, (1896); *Duncan v. Missouri*, 152 U.S.

377, 382 (1894); *Hopt v. Utah*, 110 U.S. 574, 589 (1884); *Kring v. Mo.*, 107 U.S. 221, 228 (1882), *overruled on other grounds*, *Collins v. Youngblood*, 497 U.S. 37, 37 (1990); *Gut v. State*, 76 U.S. (9 Wall.) 35 (1869); *Cummings v. Mo.*, 71 U.S. (4 Wall.) 277 (1867).

In *Gibson v. Mississippi*, this Court held that ex post facto changes in a statute "related simply to procedure . . . making no change that could materially affect the rights of one accused of crime theretofore committee[d]." 162 U.S. at 590. This Court's holding in *Gibson* was the first time the Court added to the *Calder* categories. *Id*. at 589–90. This Court made another change to ex post facto analysis in *Beazell v. Ohio*. In *Beazell*, this Court defined an ex post facto law as one that: "[1] punishes as a crime an act previously committed, which was innocent when done; which [2] makes more burdensome the punishment for a crime, after its commission or which [3] deprives one charged with crime of any defense available according to law at the time when the act was committed[.]" *Beazell v. Ohio*, 269 U.S. 167, 169 (1925). In *Beazell*, this Court collapsed the *Calder* categories and the *Gibson* addition into a succinct three-category definition that was "faithful to [this Court's] best knowledge of the original understanding of the Ex Post Facto Clause." *Collins*, 497 U.S. at 43. Therefore, the current ex post facto definition after *Beazell* prohibits laws that (1) retroactively punish a crime, (2) make a punishment more burdensome, or (3) deprive an accused of a defense. *Beazell*, 269 U.S. at 169. Because Petitioner does not allege ROSA retroactively punish a crime or deprived her of a right to a defense, the second category will be addressed.

A. ROSA Does Not Apply Retroactively

This Court held that the Ex Post Facto Clause prohibits laws that retroactively increase the punishments for criminal acts. *Calder*, 3 U.S. at 391–92; *Beazell*, 269 U.S. at 169–70. This Court noted that while "every ex post facto law must necessarily be [retroactive]; [] every [retroactive] law is not an ex post facto law." *Calder*, 3 U.S. at 391. A retroactive law applies to events that occur before the law's enactment. *Weaver v. Graham*, 450 U.S. 24, 29 (1981). The question to determine whether a law is retroactive, therefore, is "whether the law changes the legal consequences of acts completed before its effective date." *Id.* at 31.

In *Weaver v. Graham*, this Court held that the statute in question was retroactive because it affected a prisoner's already accrued gain-time for good behavior, which impacts the length of a prisoner's sentence. *Id.* at 33. The change in how prisoners could obtain gain-time statute affected the central concern of the Ex Post Facto Clause because the lack of notice afforded to prisoners that the change would increase their punishment beyond what was prescribed when the crime was consummated." *Id.* at 29. This Court determined that having notice regarding the length of incarceration was a "significant factor" for defendants needed to have informed decision regarding plea deals and a judge's calculation of a sentence. *Id.* at 31–32.

This Court in *Weaver* expressly defined the legal consequences as the petitioner's "prison term." *Id.* at 32. But, this Court did not indicate that the holding in *Weaver* would be applicable to parole conditions. And since *Weaver*, this Court has not held that the Ex Post Facto Clause applies to parole conditions as part of the sentence for a crime. The Ex Post Facto Clause "is a

limitation upon the powers of the Legislature, and does not of its own force apply to the Judicial Branch of government." *Marks v. United States*, 430 U.S. 188, 191 (1977). Furthermore, lower courts have declined to extend *Weaver* to parole conditions.

Unlike incarceration, parole conditions are set after a person's successful parole hearing. Parole conditions do not affect legal consequences of crime because they do not affect the length of the incarceration. *See Morrissey*, 408 U.S. at 477 (noting that purpose of parole is to "help individuals reintegrate into society . . . . on the condition that the prisoner abide by certain rules during the . . . sentence"). Though this Court has recognized parole as a continuation of imprisonment, *id.*, parole is distinguishable from incarceration under the Ex Post Facto Clause. Because parole conditions only occur after a review by the Parole Board, Lackawanna Correctional Law § 168-l(6)(a)–(c), the conditions do not occur retroactively. *See M.G. v. Travis*, 236 A.D.2d 163, 167 (N.Y. App. 1997) (holding that the petitioner did not have the right to a hearing because parole conditions determined by an "under active *administrative* supervision of trained officials whose discretionary determination") (emphasis in original). At the time the ROSA amendments were enacted, Respondents had the authority to impose the same parole conditions on Petitioner. *Guldoon*, 999 F. Supp. 3d at 9.

Furthermore, parole conditions are not analogous to incarceration or a defendant making an informed decision to take a plea deal or the sentence set by the court because parole conditions are determined by the Respondent. Lackawanna Correctional law § 168-l(6)(a)–(c). The conditions that are ultimately imposed are not a part of a presentencing proceeding. ROSA, therefore, is not applied retroactively. Petitioner's parole conditions were not set when she was convicted. Nor were her parole conditions set when she was sentenced to prison for ten years. Petitioner's parole conditions were set by the Respondent only after Petitioner received parole.

B. Parole Conditions Are Not Considered Punishment Under the Ex Post Facto Clause.

Even if this Court determines that ROSA applies retroactively, Petitioner's claim that ROSA violates the Ex Post Facto Clause lacks merit because parole traditionally has not been considered punishment under the Ex Post Facto Clause. This Court held that procedural changes do not violate the Ex Post Facto Clause. *Dobbert*, 432 U.S. at 292–93; *Beazell*, 269 U.S. at 171; *Mallett*, 181 U.S. at 597. The Ex Post Facto Clause only bars "penal statutes [that] disadvantage the offender affected by them." *Collins*, 497 U.S. at 41. It does not restrict "legislative control of remedies and modes of procedure [that] do not affect matters of substance." *Dobbert*, 432 U.S. at 293. Rather, it "forbids the application of any new punitive measure to a crime already consummated." *Lindsey v. Wash.*, 301 U.S. 397, 401 (1937).

This Court defined punishment under the Ex Post Facto Clause to apply only to the "penalty by which a crime is punishable," specifically a "prisoner's actual term of confinement." *Cal. Dep't of Corr. v. Morales*, 514 U.S. 499, 507 (1995); *see also Lynce*, 519 U.S. at 443 (noting that the determination of whether a statute increases a punishment "rested entirely on . . . the impact of the change on the length of the offender's presumptive sentence"). This Court considered whether an ex post facto violation occurs for circumstances that affect an offender's

incarceration. For example, in *Weaver v. Graham*, this Court found a decrease in the amount of "gain-time" a prisoner accrued for good behavior violated the Ex Post Facto Clause. 450 U.S. at 31. In *Miller v. Florida*, this Court found that a change in sentencing guidelines did not violate the Ex Post Facto Clause. 482 U.S. 423, 431 (1987). Similarly, in *Cal. Dep't of Corr. v. Morales*, this Court found that a decrease in frequency of parole hearings did not violate the Ex Post Facto Clause. 514 U.S. at 513. In each case, this Court examine the alleged Ex Post Facto violation on the basis of the effect the procedural changes on the time of incarceration.

Parole is a "conditional liberty properly dependent on observance of special parole restrictions." *Polito*, 583 F.2d at 54. This Court has held that a retroactive change to a parole statute may violate the Ex Post Facto Clause if the changes to the statute affect the length of incarceration. *Lynce*, 519 U.S. at 441; *Weaver*, 450 U.S. at 29; *Cal. Dep't of Corr.*, 514 U.S. at 507; *Garner v. Jones*, 529 U.S. 244, 256 (2000). And, lower federal courts have affirmed this bright-line standard. *Paschal v. Wainwright*, 738 F.2d 1173 (11th Cir. 1984); *United States v. Paskow*, 11 F.3d 873 (9th Cir. 1993); *Delano v. Petteys*, 520 N.W.2d 606 (S.D. 1994); *Thomas v. Yates*, 637 F. Supp. 2d 837 (E.D. Cal. 2009); *In re Vicks*, 56 Cal. 4th 274 (2013). For changes in a parole statute to be unconstitutional under the Ex Post Facto Clause, the changes must bear "a sufficient risk of increasing the measure of punishment attached to the covered crimes."

The changes in a statute that bare only an "insignificant risk of increased punishment[,]" do not constitute an ex post facto violation. *Cal. Dep't of Corr.*, 514 U.S. at 507, 509–10. The Ex Post Facto Clause should not be used for "the micromanagement of an endless array of legislative adjustments to parole and sentencing procedures." *Id.* at 508. Permitting such a rule would "require that [this Court] invalidate any of a number of minor . . . mechanical changes that might produce some remote risk of impact on a prisoner's expected term of confinement." *Id.*; *Garner*, 529 U.S. at 252 ("States must have due flexibility in . . . parole procedures and [to] address[] problems associated with confinement and release."). Therefore, for a law to violate the Ex Post Facto Clause, the law must affect substantial personal rights. *Dobbert*, 432 U.S. at 293.

In 2016, the Lackawanna State Legislature made procedural changes to ROSA. It did not make substantive changes. Procedural changes only constitute a violation of the Ex Post Facto Clause if it "affect[s] matters of substance by depriving a defendant of substantial protections." *Collins*, 497 U.S. at 45. The amendments to ROSA does not deprive Petitioner of substantial protections that were not available before the commission of her crime. *See, e.g.*, Morrissey, 408 U.S. at 480 (noting that parolees only have a conditional liberty interest in their parole conditions). Additionally, the changes to ROSA were simple procedural changes. The amendments to ROSA challenge only affected the manner and ways in which Respondents set parole conditions for paroled sex offenders. The amendment to ROSA does not impact the length of Petitioner's incarceration because parole conditions are not considered punishment for the purposes of the Ex Post Facto Clause. *Lynce*, 519 U.S. at 441; *Weaver*, 450 U.S. at 29; *Cal. Dep't of Corr.*, 514 U.S. at 507; *Garner*, 529 U.S. at 256. Petitioner's parole conditions set under ROSA, therefore, do not constitute punishment under the Ex Post Facto Clause. While a

procedural change to a statute may cause some disadvantages to Petitioner, a procedural change is not sufficient to assert a violation of the Ex Post Facto Clause. *Dobbert* 432 U.S. at 294.

1. Under a Mendoza-Martinez analysis, ROSA does not constitute punishment.

This Court held that "an imposition of restrictive measures on sex offenders adjudged to be dangerous is a 'legitimate nonpunitive governmental objective and has been historically so regarded.'" *Smith v. Doe*, 538 U.S. 84, 93 (2003). (quoting *Kan. v. Hendricks*, 521 U.S. 346, 363 (1997)). The principal inquiry in an ex post facto challenge of a statute that does not affect incarceration is whether the legislative intent was to punish. *Id.* If the legislature intended "to enact a regulatory scheme that is civil and nonpunitive, [this Court] examines the statutory scheme to see if it is 'so punitive either in purpose or effect as to negate the State's intention to deem it civil." *Smith*, 538 U.S. at 92. (quoting *Ward*, 448 U.S. at 248–249). In deciding whether the legislature's intent was nonpunitive, this Courts "defers to the legislature's stated intent." *Id.* (quoting *Kan. v. Hendricks*, 521 U.S. at 361). Only the "clearest proof" is sufficient "to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Id*. (quoting *United States v. Ward*, 448 U.S. at 249).

Whether the effects of ROSA were punitive is "a matter of statutory construction," *Hudson v. United States*, 522 U.S. 93, 99 (1997). This Court stated that determining whether a penalty is civil or criminal begins with express or implied legislative preference. *Ward*, 448 U.S. at 248. And, even when a legislature indicates that a penalty is intended to be civil, this Court has inquired further to determine "whether the statutory scheme was so punitive either in purpose or effect as to negate that intention." *Id.* at 248–49.

In *Kennedy v. Mendoza-Martinez*, this Court established a seven-factor analysis to serve as "useful guideposts," 372 U.S. 144, 168–69 (1963), to analyze whether a penalty is a civil regulatory scheme or "essentially penal in character." *Id.* at 164. However, the individual factors established in *Mendoza-Martinez* are "neither exhaustive nor dispositive." *Id.* The *Mendoza-Martinez* factors were derived by this Court from "tests traditionally applied to determine whether an Act of Congress is penal or regulatory in character." *Id.* at 168. The *Mendoza-Martinez* factors are:

> [1] Whether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment, [3] whether it comes into play only on a finding of scienter, [4] whether its operation will promote the traditional aims of punishment -- retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions.

Id. Since this Court's decision in *Mendoza-Martinez*, the factors have been used to determine whether state statutes are penal or regulatory for the purposes of the Ex Post Facto Clause.

Hudson, 522 U.S. at 93; *Kan. v. Hendricks*, 521 U.S. 346, 346 (1997); *Ward*, 448 U.S. at 242; *Allen v. Ill.*, 478 U.S. 364 (1986).

Applying the *Mendoza-Martinez* factors to ROSA, the relevant factors are: (1) whether Petitioner's parole conditions involve an affirmative disability or restraint; (2) whether Petitioner's parole conditions have been historically regarded as punishment; (3) whether the amendment to ROSA promote retribution or deterrence; (4) whether there an alternative purpose to which Petitioner's parole conditions may be rationally connected; and (5) whether Petitioner's parole conditions appear excessive in relation to the alternative purpose assigned. *Id.*

First, Petitioner's parole conditions set under ROSA do not involve an affirmative restraint because it is an alternative to incarceration. Parole is a pardon from incarceration. The Eighth Circuit recognized in *Doe v. Miller* that a statute limiting sex offenders from residing within 2,000 feet from a school was more restrictive than the registration law at issue in *Smith v. Doe*, the residency restriction was "certainly less disabling [] than the civil commitment scheme at issue in Hendricks[.]" 405 F.3d at 721. The Eighth Circuit also recognized that, like this Court decision in *Smith v. Doe* and *Hendricks*, "the degree of the restraint involved in the light of the legislature's countervailing nonpunitive purpose" leads an analysis under *Mendoza-Martinez* to "whether the regulatory scheme has a rational connection to a nonpunitive purpose." *Id.* (internal quotations omitted). This Court has even held a civil confinement scheme to be constitutional for Ex Post Facto purposes. In *Hendricks*, this Court held that the imposition of an affirmative restraint "does not inexorably lead to the conclusion that the government has imposed punishment." 521 U.S. at 363. Parole is a liberty granted to an offender by a parole board before their sentence has been completed. The parole conditions set by ROSA, however burdensome, are less restraining than the restrictions Petitioner would have if she remained incarcerated.

Second, Petitioner's parole conditions set by ROSA historically have not been regarded as a form of punishment. Rather, parole is a limited form of liberty, granted to offenders in an effort to facilitate early rehabilitation. As Justice Scalia stated, "any sensible application of the Ex Post Facto Clause . . . faithful to its historic meaning, must [distinguish] between the penalty that a person can anticipate for the commission of a particular crime, and opportunities for mercy or clemency that may go to the reduction of the penalty." *Garner*, 529 U.S. at 258 (Scalia, J., concurring). Parole is an opportunity for mercy because it reduces the penalty of incarceration. Parole, and its associated conditions, is a lessening of a punishment.

Third, Petitioner's parole conditions set by ROSA are not retributive and deterrence. Section 1 of ROSA provides clear intent that the Lackawanna legislature did not intend for ROSA to be punitive. Registration of Sex Offenders Act, P.L. 2016-1 §1. Section 1(A) states that ROSA "is to assist local law enforcement agencies' effort to protect their communities . . ." *Id.* Additionally, Section 1(B) provides that "[i]n balancing offenders' rights, and the interests of public security, the legislature finds that releasing information about sex offenders to appropriate and responsible parties will further the primary government interest of protecting vulnerable populations and the public from potential harm. *Id.* at §1(B). ROSA "protects the public" from the "dangers of recidivism posed by sex offenders" to "prevent further victimization."

Registration of Sex Offenders Act, P.L. 2016-1 § 1(A)–(B). ROSA only applies to parolees that have committed sex offense, as defined in ROSA, Lackawanna Executive Law § 259-c (15); Lackawanna Correctional Law § 168-a(1). Additionally, the parole condition Petitioner challenges do not apply for life: parole conditions only last until the sentence has been fulfilled. In *Doe v. Miller*, the Eighth Circuit held that "[w]hile any restrain or requirement imposed on those who commit crimes is at least potentially retributive in effect," the petitioner's parole condition, "like the registration requirement in *Smith v. Doe*, is consistent with the legislature's regulatory objective of protecting the health and safety of children." 405 F.3d. at 720.

Fourth, the amendment to ROSA has a clear alternative to which the conditions may be rationally connected—public safety, specifically the safety of minors from sexual abuse and harassment. Registration of Sex Offenders Act, P.L. 2016-1 §1; *see also Packingham*, 137 S. Ct. 1730, 1739–40 (2018) (Alito, J., concurring) ("The internet provides previously unavailable ways of communicating with, stalking, and ultimately abusing children[]"). In *Smith v. Doe*, this Court reasoned that the Alaskan statute mandating sex offenders to register with law enforcement had the "purpose and principal effect" of enhancing the public's safety. 538 U.S. 99. This Court declared that imposing "restrictive measures on sex offenders adjudged to be dangerous is a 'legitimate nonpunitive governmental objective and has been historically so regarded.'" *Smith*, 538 U.S. at 93 (quoting *Hendricks*, 521 U.S. at 363). This Court granted deference to the legislature's determination that sex offenders had a substantial risk of recidivism, remembering that "[w]e have upheld against ex post facto challenges laws imposing regulatory burdens on individuals convicted of crimes without any corresponding risk assessment." *Id.* at 103–104. Similarly, in *Matter of Williams v. Department of Corr. & Community Supervision*, the Supreme Court of New York, Appellate Division applied the *Mendoza-Martinez* Factors and held that the New York Sex Offender's Registration Act did not violate the ex post facto clause because the legislature did not have a punitive intent. 136 A.D.3d 147, 156-157 (N.Y. App. Div. 2016). Though it did not apply all the Mendoza factors in *Matter of Williams*, the court noted that "while some factors favor petitioner, overall we do not find the clear proof that is necessary to support a determination that SARA is punitive in its effect." *Id.* at 157.

Finally, Petitioner's parole conditions set under ROSA are not excessive in relation to its clear alternative purpose: protecting the public from the dangers of sex offenders. This Court held that the standard for determining whether Petitioner's parole conditions are excessive is "whether the regulatory means chosen are reasonable in light of the nonpunitive objective," disprovable only by the "clearest proof that the effects of the law negate . . . intention." *Smith*, 538 U.S. at 105–106. This Court has repeatedly upheld post-confinement requirements for sex offenders on Ex Post Facto grounds, declaring public safety to be not excessive in relation to the public safety dangers posed by repeat sex offenders. *Id.* at 99; *Hendricks*, 521 U.S. at 346.; *McKune v. Lile*, 536 U.S. 24, 33–34 (2002) ("When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault") (internal citations omitted). Moreover, several lower courts have upheld statutes similar

to ROSA. *Doe v. Pataki*, 120 F.3d 1263, 1284 (2d Cir. 1997); *Miller*, 405 F.3d at 721; *Matter of Williams*, 136 A.D.3d at 157. Petitioner's parole conditions are separate from incarceration. Petitioner's parole conditions are limitations Petitioner would experience if still incarcerated. Petitioner's parole conditions, therefore, cannot be seen as punitive because she is still serving her sentence, *Morrisey*, 408 U.S. at 477, and she would have more restrictions if incarcerated. Thus, under a Mendoza-Martinez analysis, ROSA still does not violate the Ex Post Facto Clause.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Thirteenth Circuit and find that Petitioner's parole conditions set under ROSA does not violate the Fourteenth or First Amendment and that ROSA does not violate the Ex Post Facto Clause.